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United States

OCTOBER TERM, 1979

NO. 79-1260

NOEL CHANDLER and ROBERT GRANGER,
Appellants,

vs.

STATE OF FLORIDA,
Appellee.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Noel Chandler and Robert Granger appeal from a final judgment of the Supreme Court of Florida, dated September 27, 1979. (Petition for Rehearing denied on

December 10, 1979). That judgment affirmed a lower court's determination that the presence of television cameras in the courtroom during the defendants' trial pursuant to Experimental Canon 3A(7), Code of Judicial Conduct of the State of Florida,[1] did not violate the defendants' rights to a fair trial and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States, respectively. This Jurisdictional Statement is submitted to demonstrate that this Court has jurisdiction of the appeal, and to set forth the substantial federal question presented.

OPINIONS BELOW

The opinion of the Supreme Court of Florida, a copy of which appears in the Appendix hereto at Pages A 3-4 is published at 376 So.2d 1157 (Fla. 1979). The opinion of the District Court of Appeal of Florida, Third District, reported at 366 So.2d 64 (Fla. 3rd D.C.A. 1979), appears at p. A 7-25.

JURISDICTION

The judgment of the Supreme Court of Florida, in effect affirming Appellants' convictions[2] arising out of the burglary of a Miami Beach restaurant, was entered on September 27, 1979. See p. A 3-4 *infra*. This

[1]The original provisions of Canon 3A(7), as well as the relevant portions of the Florida Supreme Court opinions amending it for purposes of experimental media coverage (herein referred to as "Experimental Canon 3A(7)") are set forth at p. A 1-2, *infra*.

[2]Appellants were convicted on each of four counts: Conspiracy to Commit a Felony; Burglary; Grand Larceny; and Possession of Burglary Tools.

judgment upheld the constitutionality of Experimental Canon 3A(7), Code of Judicial Conduct of the State of Florida, which permitted live television coverage of Appellants' trial over their objections that such coverage was violative of the Sixth and Fourteenth Amendments to the Constitution of the United States. A timely Petition for Rehearing was filed on October 10, 1979 and denied on December 10, 1979. See p. A 5-6 *infra*. The Florida Supreme Court did stay the mandate pending further review in this Court. *Id.* Thereafter, Mr. Justice Powell entered an Order granting a further stay of the proceedings, on Appellants' Motion, on January 11, 1980. See p. A 32-33 *infra*.

A supplementary Notice of Appeal to this Court was duly filed in the Supreme Court of Florida on January 3, 1980. See p. A 26-27 *infra*.

This appeal is being docketed in this Court within ninety days from the date of denial of the Petition for Rehearing below. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(2).

Experimental Canon 3A(7), Code of Judicial Conduct of the State of Florida, was promulgated by the Supreme Court of Florida, purportedly pursuant to its general supervisory power under Article V of the Florida Constitution, which authorizes that Court to enact rules of procedure governing the proceedings in all Florida courts.[3] For the purposes of invoking this Court's jurisdiction under 28 U.S.C. §1257(2), the canon is a "statute", the constitutionality of which has been upheld by the highest court in the State of Florida. See,

[3]F.S.A. Const. Art. V, §2 (1972).

In Re Griffiths, 413 U.S. 717 (1973); *Mayer v. City of Chicago,* 404 U.S. 189 (1971) (rules of State Courts are "statutes" for purposes of §1257(2)).

QUESTION PRESENTED

Whether Experimental (now permanent) Canon 3A(7) of the Code of Judicial Conduct of the State of Florida is violative of a defendant's rights to a fair and impartial trial, and to due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States as written or when applied to permit electronic and still photographic media coverage of a trial in progress over a defendant's objection.

CONSTITUTIONAL PROVISIONS

Amendment VI, to the Constitution of the United States, provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Amendment XIV, to the Constitution of the United States, provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . .

STATUTE INVOLVED

32 F.S.A. Jud. Conduct Canon 3A(7) (1978 Supp.) was revised by the Florida Supreme Court to permit electronic media coverage of courtroom proceedings. The original Canon 3A(7), in pertinent part, provided:

> (7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto . . .

The Canon was revised to permit such coverage on an experimental basis in *Petition of Post-Newsweek Stations, Fla., Inc.*, 327 So.1 (Fla. 1976) *modified* 337 So.2d 804 (Fla. 1976), *modified* 347 So.2d 402 (Fla. 1977), *modified* 347 So.2d 404 (Fla. 1977). See p. A 28-31 *infra*.

Subsequently, Canon 3A(7) was permanently amended to permit electronic media and still photographic coverage of courtroom proceedings, and now provides:

> Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure fair administration of justice in the pending cause, electronic media and still photography coverage of public, judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

32 F.S.A. Jud. Conduct Canon 3A(7) (Sept. 1979 Supp.).

RAISING THE FEDERAL QUESTION

From the very outset of Appellants' trial, the record is replete with numerous challenges made by counsel concerning the presence of television cameras, electronic media, and still photographers. Both oral and written challenges to the coverage were made on constitutional grounds. See p. A 11 *infra.* All such motions were denied by the trial judge, who did, however, certify to the Florida Supreme Court the question of whether the Experimental Canon was mandatory or discretionary. The Supreme Court declined to rule on the trial court's certified question since it was not dispositive of the charges against the defendants, *State of Florida v. Granger,* 352 So.2d 175 (Fla. 1977).

In the District Court of Appeal, Appellants urged error by virtue of the presence of television cameras and still photographers, who recorded portions of the trial while it was actually in progress, both in and out of the presence of the jury. In their brief on appeal, Appellants specifically stated the issue as follows:

> Whether the trial court erred in denying defendants' various motions to declare Experimental Canon 3A(7) unconstitutional in refusing to preclude television cameras from defendants' trial, and in declining to sequester the trial jury, all contrary to defendants' Sixth and Fourteenth Amendment rights to a fair and impartial trial and due process of law.

See p. A 19 *infra.*

The District Court responded directly to Appellants' Assignment of Error on constitutional grounds:

> The first point of the defendants urges error upon the trial court's refusal to preclude television cameras from their trial. Experimental Canon 3A(7), Code of Judicial Conduct of the State of Florida, was promulgated by the Florida Supreme Court pursuant to its inherent and constitutional power under Article V of the Florida Constitution. The canon establishes standards and criteria for the use of cameras and electronic recording devices in all of Florida's courtrooms. The court, therefore, must be presumed to have considered that the adoption of the canon preserves the rights of the parties.
>
> In determining that a one year trial program should be instituted, the Florida Supreme Court has determined that camera coverage of a trial does not, in and of itself, violate the federal and state constitutions. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.2d 1 (Fla. 1976), 337 So.2d 804 (Fla. 1976), 347 So.2d 402 (Fla. 1977), 347 So.2d 404 (Fla. 1977). We, therefore, decline to discuss further the constitutionality per se of the canon, although we will, in view of the importance of the question involved, certify the decision to the Supreme Court of Florida as a question of great public interest. [footnote omitted].

See p. A 19 *infra.*

In addition, the District Court of Appeal found that Appellants had failed to meet *their* burden of proving that either the presence of cameras in the courtroom or the failure of the trial judge to sequester the jury operated to deprive them of a fair and impartial trial. See p. A 20, *infra.*

On petition for certiorari to the Florida Supreme Court, Appellants renewed their constitutional objections to the admission of the electronic media. Both appellants and respondents argued the point extensively in their briefs on certiorari. Prior to the decision in this case, however, the Florida Supreme Court made the experimental televised trial rule permanent, thus giving the media unlimited live access to Florida's courtrooms while pre-trial motions and trials were in progress. *Petition of Post-Newsweek Stations, Florida,* 370 So.2d 764 (Fla. 1979). Significantly, the *Post-Newsweek* proceedings were never adversarial in nature. No defendant accused of a crime had standing to challenge it *ab initio.*

In the last *Post-Newsweek* case, the Florida Supreme Court expressly dealt with the constitutional issues presented *sub judice. Id.,* at 771-79. There the Court was dealing with *Amicus* briefs in opposition to the Rule, as opposed to the present context convicted Appellants seeking relief in an adversarial setting. Predictably, the Court found no infirmities of constitutional importance to have been generated by its Experimental Canon.

On certiorari to the Florida Supreme Court, Appellants' brief reiterated the constitutional claims by reference to their initial brief before the Court. Nonetheless, the Florida Supreme Court dismissed the Appeal and denied the Petition for Writ of Certiorari, stating:

> . . . We have no appellate jurisdiction, as the district court expressly declined to rule upon the constitutional issue *Chandler v. State,* 366 So.2d 64, 69 (Fla. 3rd D.C.A. 1978).[4]
>
> Nor do we have certiorari jurisdiction. No conflict has been demonstrated, and the question of great public interest certified to us by the district court has been rendered moot by the decision in *Petition of Post-Newsweek Stations, Florida, Inc.,* No. 46, 835 (Fla. Apr. 12, 1979). [370 So.2d 641 (Fla. 1979)].

See p. A 3-4 *infra.*

The Florida Supreme Court thus considered and expressly rejected renewed argument of the constitutional question before it, contending that its earlier pronouncement on the constitutional propriety of electronic media coverage of criminal trials rendered Appellants' arguments moot. The Federal question has therefore been seriously, conscientiously and continuously pursued below.

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[4]In fact, the District Court of Appeal did rule on the constitutional issue referring to the *Post-Newsweek* decisions and authority to "decline to discuss *further* the constitutionality per se of the Canon." See p. A 19 *supra.* [Emphasis added.]

STATEMENT OF THE CASE

Appellants, NOEL CHANDLER and ROBERT GRANGER, were charged in a four-count information which arose out of the burglary of a popular Miami Beach restaurant (Picciolo's) on May 23, 1977. While all the details of the incident are not relevant to the issue currently before the Court, several aspects of the case separate it from the ordinary burglary. Both Appellants were, at the time of the burglary, City of Miami Beach police officers. In addition, certain evidence central to the State's case against Appellants was obtained in a most unusual manner — a local "ham" radio operator had intercepted oral conversations which were purportedly made between Appellants over their "walkie-talkie" radios during the burglary at 2:50 a.m. This amateur radio enthusiast tape-recorded those intercepted communications. The recording was eventually turned over to the Miami Beach Police Department and used as evidence against Appellants at trial.

The charges, therefore, presented unique and newsworthy details not ordinarily associated with "run of the mill" criminal cases. This case contained at least two elements capable of generating abnormal public interest above and beyond that usually associated with a burglary: a potential betrayal of the public trust by "good 'cops' gone bad"; and a "one-in-a-million" fluke interception and recording, by an insomniac ham radio operator, of a conversation broadcast on a little-used frequency in the "dead" of the South Florida night. As might be expected in light of the above, Appellants' case received extensive and repeated pre-trial, as well as trial, attention in the local media.

Against this background of widespread publicity, Appellants endeavored to minimize the potential for jury and witness prejudice by moving for exclusion of the electronic media at the earliest opportunity.[5] At the hearing on Appellants' Motion to Suppress, the Trial Court denied one of several motions to bar television cameras and still photographers which were made throughout the pre-trial and trial proceedings. Still photographers and television cameras were permitted to record the proceedings "live and in person", and in the presence of the jury, pursuant to Experimental Canon 3A(7).

At trial, counsel for Appellants renewed the challenges to Experimental Canon 3A(7) as violative of the Sixth and Fourteenth Amendments to the United States Constitution. Again, the objection to media presence was denied and the trial proceeded under the watchful lens of Miami's electronic press. Appellants were eventually convicted of all the charges against them, and sentenced to a total of seven years' imprisonment, to be followed by nine years' probation.

In the Florida District Court of Appeal, Appellants assigned as errors the refusal of the Trial Court to exclude the electronic media from the courtroom at Appellants' repeated urging. The Court of Appeal, in its analysis of these constitutional claims, chose to defer to the opinion of the Florida Supreme Court, in which that

[5]Defense counsel's repeated objections during pre-trial proceedings resulted in the trial court's certification of the question concerning the mandatory nature of the Experimental Canon. As stated above, the Supreme Court declined to rule on the question. *State of Florida v. Granger*, 352 So.2d 175 (Fla. 1977).

Court instituted the experimental program. The intermediate appellate court assumed that that decision represented a conclusion by the Florida Supreme Court that the Televised Trial Rule was not unconstitutional *per se* and thus was dispositive of this issue. Nevertheless, the Court certified the question to the Florida Supreme Court as "one of great public interest". In addition, the Court determined that Appellants had the burden of showing actual prejudice caused by the presence of electronic media in order to establish a denial of Federal constitutional rights by reason of the operation of Experimental Canon 3A(7). Having failed to carry their "burden", the Court concluded that Appellants failed to establish either a deprivation of their rights to a fair and impartial trial or a denial of their rights to due process of law under either the Sixth or Fourteenth Amendments to the United States Constitution.

Appellants again renewed their constitutional claims at length before the Florida Supreme Court on Petition for Certiorari and Appeal. Despite certification of the question by the District Court of Appeal, and extensive briefing of the point by both Appellants and Appellee, the Florida Supreme Court summarily dismissed the issue as having been rendered moot by the intervening decision of the Court in *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979), to make the Experimental Canon permanent. The Petition for Writ of Certiorari was therefore denied on the basis of the constitutional discussion contained in the *Post-Newsweek* decision. See 370 So.2d at 770-79, and the appeal dismissed as discussed earlier.

THE QUESTION IS SUBSTANTIAL

The Supreme Court of Florida permits television, radio, electronic media and still photographic coverage of literally all that occurs in State trial and appellate courtrooms.[6] Instituted initially on an experimental basis, coverage is now permanent and mandatory in civil and criminal matters, at pre-trial, trial and appellate stages. As a result, judicial proceedings in Florida have been elevated to a new standard of public access. Trials are not only open to the populace, they are, in fact, delivered in carefully selected instances and highly-edited forms, to the living rooms and bedrooms of Florida's residents. So enthusiastically has the Florida Supreme Court embraced the concept of video justice that it has enhanced the procedural rules in such a manner so as to guarantee that the "artistic" efforts of media are unimpeded by any objections raised by the trial participants. No defendant, witness, or juror in a criminal matter, nor any litigant or participant in any civil, divorce, equity or probate proceedings, may preclude media coverage of his or her trial or participation therein.

Florida has instituted media coverage in an ostensible effort to "enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." *Post-Newsweek, supra,* 370 So.2d 780. In the interest of the hypothetical benefits flowing from this novel fascination with public relations, however,

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[6]As of January 22, 1980, according to the National Center of State Courts, Research and Information Service, 23 states allow television coverage in the courtroom on either a limited, experimental, or permanent basis. See also, footnote 7.

the Florida Supreme Court has cavalierly flirted with the possibility of irreparable damage to the most fundamental underpinnings of our criminal justice system — the accused's rights to a fair trial and to due process of law guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. To date, dozens, possibly hundreds, and maybe thousands of defendants in Florida courts, including Appellants, have been, or are being subject to in-progress media coverage of their trials. Many thousands more face a similar prospect in the future, both in Florida and elsewhere as half of the State thus far have rushed to duplicate the Florida script for the promotion of open government and the achievement of enhanced ratings for television news programs.[7]

This case presents the Court with a clear opportunity to determine whether the proliferation of cameras in the courtrooms, over the objections of a defendant, is consistent with the protections insured by the Constitution of the United States. The rule promulgated by the Florida Supreme Court has encouraged other states whose courts have long felt constrained by Constitutional mandate from allowing electronic media coverage of criminal trials in progress. While the Constitutional debate on this subject has been lengthy and heated, absent a final decision by this Court, the momentum of the Florida Rule will continue

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[7]See footnote 6; the States which do permit coverage in one form or another are: Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Idaho, Iowa, Louisiana, Minnesota, Montana, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, West Virginia and Wisconsin. (New York and New Mexico have had one-day experiments only).

to spread camera coverage of criminal trials to other states without serious investigation of the potential danger being inflicted upon the integrity of the criminal justice system nationwide. It is therefore urgent that this Court render its decision to prevent Florida and other individual states from continuing this constitutionally blind rush to electronic justice.

ELECTRONIC MEDIA COVERAGE OF A TRIAL OVER THE ACCUSED'S OBJECTION VIOLATES THE DEFENDANT'S RIGHTS TO A FAIR AND IMPARTIAL TRIAL AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

1. The presence of electronic media in the courtroom over the defendant's objection is wholly inconsistent with prior constitutional pronouncements of this Court.

At the very center of the constitutional inquiry into the propriety of electronic media access to the courtroom is recognition of the purpose of a trial. This Court has previously determined that a defendant was deprived of his constitutional rights to due process of law and a fair and impartial trial when portions of his trial and certain pre-trial proceedings were televised and broadcast over his objection. *Estes v. State of Texas*, 381 U.S. 532 (1965). At that time, the Court emphatically rejected the notion that broadcast coverage of a defendant's trial in progress or pre-trial matters was consistent with the fundamental purpose of a trial:

> Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries, Anglo American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result, at this time these safeguards do not permit the televising and photographing of a criminal trial, save in two states and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial — the most fundamental of all freedoms — must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is clear and certain of application and it is our duty to continue to enforce the principles that from time to time have proven efficacious and necessary to a fair trial.

Id., 381 U.S. 540-41. That Experimental (now permanent) Canon 3A(7), Code of Judicial Conduct of the State of Florida, exists at all is prime evidence that the Supreme Court of Florida has improperly disregarded the constitutional infirmities which mandated reversal of *Estes'* conviction almost fifteen

years ago.[8] That the number of states now permitting televised trials has grown so dramatically despite so lucid a pronouncement by this Court in *Estes* is, in itself, evidence of the absolute necessity for review of the Florida Canon at this time.

The concerns voiced by the *Estes* Court remain proper objects of apprehension today. The spectre of undesirable psychological effects on jurors and witnesses has increased as a result of the pervasive persuasiveness of the electronic media. Mr. Justice Clark's concern with the additional political pressures on the trial judge is still more frightening today in view of the examples of

[8]Significantly, the decisions authorizing the Experimental Canon in effect at the time of appellants' trial made no mention whatsoever of the *Estes* decision. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.1 (Fla. 1976), *modified* 337 So.2d 804 (Fla. 1976), *modified* 347 So.2d 402 (Fla. 1977), *modified* 347 So.2d 404 (Fla. 1977).

extreme media abuses demonstrated in this country,[9] and around the world, where televised tribunals affect justice aimed at inflaming the masses, politicizing an issue, or otherwise abusing the very purpose of a "trial" in the traditional sense. Neither have the problems of media abuse nor the need for lucrative sponsorship been resolved to assure that televised trials will not be another electronic narcotic serving the public's addiction to the sensational. In short, the reasoning of this Court in *Estes* has survived the test of time, and the essential conclusions rendered therein remain logically imperative:

> As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said

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[9]As representative of the fears expressed during the experimental year, Judge Norman C. Roettger, evaluating a challenge to the Florida Canon filed in U.S. District Court for the Southern District of Florida, made the following statement:

> And I might say that I find the order of the Supreme Court of Florida distressing. [Experimental authorization] Not one word in that opinion, in that order concerning the rights of the litigants. I find it particularly distressing where it says 'request from the news media,' and where in this state, as is obvious in the past few years, Supreme Court Justices can be made or broken as far as their election chances by the news media.

Memorandum Opinion from the bench in *Briklod v. Rivkind,* Case No. 77-2148 (U.S.D.C. So.Dist.Fla. 1977) at 5-6. Despite his stated opposition to the experimental rule, Judge Roettger was unable to find the rule "flagrantly and patently violative of express constitutional prohibitions in *every* clause, sentence and paragraph." *Id.*, applying the standards set forth in *Judice v. Vail,* 430 U.S. 327 (1977).

> to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into the court proceedings.

381 U.S. at 544, 85 S.Ct. at 1634.

The constitutional mandate expressed in *Estes* was deftly sidestepped by the Florida Supreme Court in its enactment of Experimental (now permanent) Canon 3A(7), largely based on the 4-1-4 division of the *Estes* Court. Relying substantially on Mr. Justice Harlan's "swing" vote in the plurality, *Petition of Post-Newsweek Stations, Florida, Inc., supra,* 370 So.2d at 773, the Florida Supreme Court took license to disregard the clear constitutional reasoning underlying the decision. In fact, Mr. Justice Harlan himself recognized the difficulties inherent in his choice of a narrow constitutional adjudication, acknowledging that the constitutional issue in the future might not survive the limiting of his concurrence to the specific facts of *Estes:*

> . . . I wish to make perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn on the nature of the particular case involved. When the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportion.

381 U.S. at 590, 85 S.Ct. at 1663. To argue that *Estes* is constitutionally impotent, and thus may be ignored by

the states in their rush to permit media coverage of criminal trials is to plunge the literal language of this cautious constitutional jurist far below the obvious depth of his analysis. Florida Canon 3A(7) is thus inconsistent with the governing constitutional pronouncement of this Court in *Estes,* and televised trials must remain among that class of procedures involving "such a probability that prejudice will result that it is deemed inherently lacking in due process." *Id.*, at 381 U.S. 543-44, 85 S.Ct. at 1633.

Moreover, recent and pending constitutional evaluations of the role of the media in the courtroom lend further support to the need for immediate review of this case by this Court. The constant concern over the dangers of a publicity-polluted trial to a defendant's Sixth and Fourteenth Amendment rights led to this Court's significant ruling in *Gannett Co. v. DePasquale,* 99 S.Ct. 2898 (1979). The interests protected by the closure order in *Gannett* are the sort threatened by televised trials, and the potential for injury of constitutional magnitude is multiplied many times by the pervasive presence of electronic media coverage. In Florida, under Canon 3A(7) and even after *Gannett,* pre-trial publicity has not been minimized, rather it has been expanded, frequently in "living color". The concerns for protective measures so central to the *Gannett* decision are especially pressing where, as in Appellants' case, even a pre-trial motion to suppress (heard a few scant weeks before trial) is *subject* to televised coverage over their objections (although this did not actually occur). That such an occurrence remains capable of repetition despite the *Gannett* decision further underscores the need for review by this Court of the Florida Supreme Court's actions.

Notation of probable jurisdiction by this Court will, in addition, provide the opportunity to fully explore and authoritatively define the issues currently under the Court's review in *Richmond Newspapers, Inc. v. Virginia,* ____ U.S. ____ (Case No. 79-243) (Pending). The *Richmond* case, dealing with the question of the constitutional limits of media access to judicial proceedings, is the other side of the question presented here: When does the possibility of potential prejudice mandate that media activities be limited to protect the Constitutional rights of the accused?

The question of media access is clearly married to the evaluation of the results of coverage once access is granted. Resolution of this case will therefore provide this Court with an opportunity to define the permissible scope of media access to criminal pre-trial and trial proceedings where the accused objects to live television, electronic and/or still photographic coverage.

2. The circumstances surrounding the implementation of Experimental (now permanent) Canon 3A(7) demonstrate that the constitutional ramifications of televised criminal trials have not been properly considered by the Florida Supreme Court.

The Florida Supreme Court's decision in *Petition of Post-Newsweek Stations, Fla., Inc.,* 370 So.2d 764 (Fla. 1979), upon which that Court relied in denying Appellants' petition below, itself details the myriad of difficulties encountered in the attempt to institute televised coverage of Florida's judicial proceedings.

These problems underscore the high degree of resistance to the Court's Rule.[10] Even more significant is the realization that the entire project was instituted at the behest of the media itself. This belies any claim of broad legal support for the alteration of the Canon and raises the spectre of both commercial self-interest and the utilization of, at least, undue and subtle pressure by media on the elected Florida Supreme Court Justices.

By its own account, the Florida Supreme Court was forced, from the very outset, to continuously enlarge the scope of the experiment in an effort to obtain "volunteer" participation by wary litigants and participants during the early stages of the Experimental Canon, *Post-Newsweek Stations, Florida, Inc.*, 370 So.2d at 766. The Court's original Order authorizing televised trials was amended no fewer than five times in an effort to solicit "voluntary" participation which was ultimately conscripted for a period of one year when it became painfully apparent that trial judges, lawyers, jurors, witnesses and litigants wanted nothing to do with *Post-Newsweek's* intimidating experiment in living judicature. Even the Florida Supreme Court noted that *"The overwhelming majority* of the trial judges of this state, while generally unsympathetic to the experiment, made a good faith effort to comply . . ." *Id.*, at 767. [Emphasis added.]

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[10]The list of organized Bar and professional groups which opposed the experimental rule is prestigious indeed: The Florida Bar, the Conference of Circuit Judges, the Trial Lawyers Section of the Florida Bar, Chairman of the Florida Judicial Qualifications Commission, and others. See *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.2d 1 (1976).

After the one-year period ended, in an effort to lift the experiment up by its own bootstraps, the Florida Supreme Court attempted for the first time to evaluate the effect of the "cameras in the courtroom" project on witnesses, jurors, attorneys, judges and litigants. Those attempts at controlled and empirical study of the results went totally astray. Ultimately, the sole "objective" study conducted by the Court, through the Judicial Planning Coordination Unit of the Office of State Courts Administration (OSCA), was a subjective questionnaire distributed to some of the participants in televised trials.

Though outwardly cautious about the significance of such unscientific a study, the Court used its interpretation of the results as the hub for its conclusion that television coverage should be permitted because it did not infect the trial proceedings. *Id.*, at 766-69, 781. In fact, even this survey, when read objectively, reveals that the Court used general terms to gloss over the fact that a Constitutionally significant number of persons who responded to the questionnaire were in some way affected, influenced by, or aware of, the camera's presence during the trial. Worse still, an independent analysis of the method used in, and details of, the questionnaire commissioned by Appellants' attorney, revealed *serious* defects that rendered the entire questionnaire meaningless. Moreover, extensive proffers of previous empirical studies tending to confirm the dangers foreseen by this Court in *Estes* were ignored by the Florida Supreme Court in its opinion.[11]

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[11]Among the authorities referred to the Florida Supreme Court by Appellants' counsel in his capacity as *amicus curiae* in opposition to the *Post-Newsweek* Petition were:

Asch, Solomon E., "Studies of Independence and Conformity; A Minority of One Against a Unanimous Majority", *Psychological Monographs:* General and Applied, Vol. 70, No. 9

Deutsch, Morton and Harold Gerard, "A Study of Normative and Informational Social Influences Upon Individual Judgment", *Journal of Abnormal and Social Psychology,* Vol. 51 (1955)

Gerbner, George and Larry Gross, "Living With Television: The Violence Profile", *Journal of Communication*

Gerbner, George, et al., "Cultural Indicators: Violence Profile No. 9", *Journal of Communication,* (Summer, 1978)

Lezuk, Muriel D., "Some Psychological Limitations on Witness Reliability", 20 *Wayne L. Rev.* 117 (1973)

McClure, Robert D. and Thomas F. Patterson, "Print v. Network News", *Journal of Communication,* Vol. 26, No. 2 (Spring, 1976)

Morton, Jane S., Robert R. Blake and Joseph A. Olmstead, "The Relationship Between Frequency of Yielding and Disclosure of Personal Identity", *Journal of Personality,* Vol. 24 (1956)

Padawer-Singer, Alice, et al, "Voir Dire by Two Lawyers: An Essential Safeguard", *Judicature,* Vol. 57, No. 9 (April 1974)

Raven, Bertram H., "Social Influence on Opinions and the Communication of Related Content", *Journal of Abnormal Psychology,* Vol. 58 (1959)

No reference to these or other empirical studies tending to contradict the Florida Supreme Court's "impression" of no prejudicial effect of the media was made in any *Post-Newsweek* opinion.

Thus, the sum of the Florida Supreme Court's efforts are fairly characterized as having foisted an experimental program on an unremitting and unyielding legal community at the behest of a commercial entity, without having properly "tested the water" to ascertain the implications and effect upon the defendants' Sixth and Fourteenth Amendment rights. Despite this lack of safeguards, as documented by surveys of questionable value themselves contradicted by empirical evidence, the Florida Supreme Court made the Experimental Canon permanent, ostensibly to assure the continued desirability of open judicial proceedings. *Post-Newsweek, supra,* 370 So.2d at 781.

This is not to suggest a lack of sincerity on the part of the Florida Supreme Court concerning the alteration of the Canon. However, for the purposes of this Court's notation of probable jurisdiction on the Constitutional issue, it is vital that the Court be aware of the manner in which the Florida Supreme Court authorized a procedure which this Court has already determined to be violative of the constitutional rights of a defendant in a criminal case. Given the unique circumstances presented by a concurrence of political realities of elective judgeships and of change instituted at the urging of the media which so vitally acts on those realities,[12] the Florida Supreme Court's determination that Experimental (now permanent) Canon 3A(7) is constitutionally proper must be reviewed by this Court, as the final arbiter of all serious constitutional questions.

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[12]See footnote 9, *supra.*

3. A showing of specific prejudice is not necessary for review by this Court.

Finally, with regard to establishment of specific, articulable prejudice to Appellants' rights caused by the television and still photographic coverage of portions of Appellants' trial, this Court has already rejected the need for such a showing in *Estes.* Although the State of Florida predictably argued to the contrary below, Mr. Justice Clark's analysis of prior caselaw conclusively adopts a due process approach which dispenses with the necessity for a showing of prejudice. *Estes, supra,* 381 U.S. at 542-44, 85 S.Ct. at 1132-4. (See, also, *In Re Murchison,* 349 U.S. 133 (1955) and *Tumey v. State of Ohio,* 273 U.S. 510 (1927).) Mr. Justice Harlan, notably, concurred fully in that determination when he stated, in *Estes, supra,* 381 U.S. at 593:

> I am at a loss to understand how the Fourteenth Amendment can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom. The Court has not hesitated in the past to condemn such practices, even without *any positive showing of isolatable prejudices.* [Emphasis added.]

Mr. Justice Harlan's conclusion, therefore, is clearly consistent with this Court's holding in *Chapman v. State of California,* 386 U.S. 125 (1967), that the beneficiary of the claimed violation of a constitutional right (here the Appellee) bears the burden of showing non-prejudice. The doctrine of harmless error, therefore,

does not apply, even *if* this were a close case involving overwhelming evidence establishing the Appellants' guilt. Thus, even though Appellants' arrest, pre-trial and trial proceedings were the subject of substantial media coverage, and, as described earlier, presented the type of unique factors which would see it fairly classified as "notorious", a specific showing of prejudice in this case is unnecessary to the court's notation of probable jurisdiction.

CONCLUSION

The Florida Supreme Court, through its institution of Experimental (now permanent) Canon 3A(7), has forced upon a reluctant legal community a Rule of Court which has previously been deemed constitutionally infirm by this Court. Worse still, the circumstances surrounding the implementation of the televised criminal trial rule, render the Florida decision suspect in its constitutional analysis of its own actions. The determination of the Constitutionality of televised pre-trial and trial proceedings over a defendant's objection ought to be reviewed by this Court to guarantee that the rights of the accused in Florida, and throughout the nation, continue to be observed. Absent such review, the deprivation of Constitutional rights presently occurring in Florida will become a hallmark of trial procedure throughout the nation. For all the reasons expressed above, Appellants respectfully suggest that this Court note probable jurisdiction of this appeal, and reverse the convictions below.

Respectfully submitted,

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By: _____
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Date: February 14, 1980

APPENDIX

APPENDIX

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Canon 3A(7) of the Florida Code of Judicial Conduct provided, in relevant part:

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investitive ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction.

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

32 F.S.A. Jud. Conduct Canon 3A(7) (1978 Supp).

Canon 3A(7), as amended, now provides:

(7) Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

Amended April 12, 1979, effective May 1, 1979 (370 So.2d 764).

32 F.S.A. Jud. Conduct Canon 3A(7) (Sept. 1979 Supp.)

Noel CHANDLER et al.,
Petitioners/Appellants,

v.

STATE of Florida,
Respondent/Appellee.

Nos. 56040, 56194 and 56236.

Supreme Court of Florida.

Sept. 27, 1979.

Rehearing Denied Dec. 10, 1979.

Writs of Certiorari and Appeal from District Court of Appeal, Third District.

Joel Hirschhorn of Hirschhorn & Freeman, and Richard M. Gale, Miami, for petitioners/appellants.

Jim Smith, Atty. Gen., and Calvin L. Fox, Asst. Atty. Gen., Miami, for respondent/appellee.

PER CURIAM.

This cause reaches us by way of petitioners' assertion of appellate jurisdiction and petition for writ of certiorari from a decision of the District Court of Appeal, Third District, reported at 366 So.2d 64. We have no appellate jurisdiction, as the district court expressly declined to rule upon the constitutional issue. *Chandler v. State,* 366 So.2d 64, 69 (Fla.3d DCA 1978).

Nor do we have certiorari jurisdiction. No conflict has been demonstrated, and the question of great public interest certified to us by the district court has been rendered moot by the decision in *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (Fla. 1979).

Accordingly, the petition for writ of certiorari is denied.

It is so ordered.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and ALDERMAN, JJ., concur.

SUPREME COURT OF FLORIDA
MONDAY, DECEMBER 10, 1979

CASE NOS. 56,040
56,194
56,236

District Court of Appeal,
Third District of Florida
77-2624

NOEL CHANDLER, et al.,
Petitioners/Appellants,

v.

STATE OF FLORIDA,
Respondent/Appellee.

Upon consideration of the Petition for Rehearing filed by attorneys for Petitioners/Appellants,

IT IS ORDERED by the Court that said Petition be and the same is hereby denied.

Motion for Stay filed by attorneys for Petitioners/Appellants is hereby granted and proceedings in this Court; in the District Court of Appeal, Third District of Florida; and in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida are hereby stayed to and including January 9, 1980, to allow Petitioners/Appellants to seek review in the Supreme Court of the United States and obtain any further stay from that Court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: [Illegible]
[Illegible]

TC

cc: Hon. Louis J. Spallone, Clerk
Hon. Alan R. Schwartz, Judge
Hon. Richard P. Brinker, Clerk

Joel Hirschhorn, Esquire
Richard M. Gale, Esquire
Hon. Jim Smith-Miami
Steel, Hector & Davis

Noel CHANDLER and Robert Granger,
Appellants,

v.

The STATE of Florida,
Appellee.

No. 77-2624.

District Court of Appeal of Florida,
Third District.

Dec. 19, 1978.

Rehearing Denied Jan. 17, 1979.

Defendants were convicted in the Circuit Court, Dade County, Alan R. Schwartz.

CHANDLER v. STATE
Cite as Fla.App., 366 So.2d 64

J., of conspiracy to commit a felony, burglary, grand larceny, and possession of burglary tools and they appealed. The District Court of Appeal held that: (1) admission of television cameras into courtroom did not deprive defendants of a fair trial; (2) taperecorded conversation between defendants was admissible as defendants were not entitled to any reasonable expectation that their conversation would remain private; (3) trial court's failure to admit condensed version of tape recordings was not reversible error, and (4) evidence was sufficient to support convictions.

Affirmed.

1. Constitutional Law — 268(2)
   Criminal Law — 633(1)

Admission of television cameras pursuant to experimental canon into trial of two police officers arising out of burglary of restaurant did not deprive defendants of fair trial, due process, or an impartial jury. 32 West's F.S.A. Code of Judicial Conduct, Canon 3, subd. A(7); U.S.C.A.Const. Amends. 6, 14.

2. Criminal Law — 394.3

Private citizen's tape recording of oral "walkie-talkie" conversation between defendants was not an interception of a communication transmitted by wire or cable furnished or operated by a common carrier within meaning of statute prohibiting such an interception so as to require suppression of tape recording in prosecution growing out of burglary; defendants, who were two police officers, did not have any reasonable expectation that their conversation would remain private. West's F.S.A. §934.02(1).

3. Criminal Law — 1170(1)

Trial courts enjoy a certain discretion in ruling on admissibility of evidence and simply because the defendant thinks that tendered evidence might be beneficial does not make its rejection reversible error.

4. Criminal Law — 338(1)

Where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission.

5. Criminal Law — 1170(1)

Where defendants failed to present any reasonable theory upon which admission of condensed version of tape recording, which was originally made by private citizen, which was introduced in burglary prosecution and which tended to connect defendants with offense, would have helped prove their alibi defense, trial court's failure to admit condensed version of tape recording was not reversible error.

6. Burglary — 41(1, 9)
Conspiracy — 47(3)
Larceny — 65

Evidence, which included taped conversation between defendants tying them firmly to burglary of restaurant and testimony which placed defendants at scene of crime, was sufficient to support defendant police officers' convictions for conspiracy to commit a felony, burglary, grand larceny, and possession of burglary tools.

7. Criminal Law — 662(1)

In prosecution arising out of burglary of restaurant, defendants were allowed sufficient latitude in presenting their theory that one of State's witnesses was hostile to them; trial court's ruling limiting cross-examination of witness with regard to a complaint made by a defendant and another police officer against him

was within its discretion; thus, defendants' rights to confrontation of witnesses was not abridged. U.S.C.A.Const. Amends., 6, 14; West's F.S.A. Const. art. 1, §16.

8. Witnesses — 370(1)

It is competent to show as a fact that a witness is hostile to party against whom he testifies, and jury can consider this hostility in estimating his testimony; but an inquiry into conduct of actual parties producing hostility raises another and collateral issue, which should not be permitted to be gone into by trial judge, otherwise there would be no limit to investigation of any cause.

9. Criminal Law — 986

Defendants, who were convicted of burglary and related offenses, voluntarily waived right to presentence investigation and could not complain on appeal that absence of such investigation was error. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.710.

Hirschhorn & Freeman and Joel Hirschhorn, Miami, for appellants.

Robert L. Shevin, Atty. Gen., and William M. Grodnick, Asst. Atty. Gen., for appellee.

Steel, Hector & Davis and Talbot D'Alemberte and Donald M. Middlebrooks, Miami, For Post-Newsweek Stations of Florida, Inc. as amicus curiae.

Before HAVERFIELD, C.J., and PEARSON and KEHOE, JJ.

PER CURIAM.

Appellants Noel Chandler and Robert Granger were the defendants to a four count information[1] growing out of the burglary of Picciolo's Restaurant, Miami Beach, Florida, on May 23, 1977. At the time of the filing of the information on July 1, 1977, the two defendants were police officers with the City of Miami Beach Police Department.

During the trial, the defendants filed various motions and challenges to Florida's Experimental Canon 3 A(7). Pursuant to this canon, cameras were permitted to televise portions of the defendants' trial. The challenges were overruled and requests to exclude live television coverage were denied. In addition, the defendants' request to sequester the jury was also denied.

The trial in this case began on December 5, 1977. During the trial, evidence was presented to the effect that a few days prior to the burglary in question, defendant Chandler was one of several Miami Beach police officers who investigated another burglary at Picciolo's Restaurant.

On Sunday, May 22, 1977, Picciolo's Restaurant closed at 12:30 a.m., early on the morning of May 23,

[1]Count I — Conspiracy to Commit a Felony (a misdemeanor)
Count II — Burglary (a felony)
Count III — Grand Larceny (a felony)
Count IV — Possession of Burglary Tools (a felony)

1977. Upon reopening the restaurant at 8:00 a.m. on the morning of May 23rd, one of the cooks noticed that the floor safe, which had contained the previous day's receipts, had been "drilled" and was empty. Also, a door leading outside was open.

During the trial, defense counsel sought a Writ of Body Attachment against Don Froschneider, who had been subpoenaed as a defense witness and whose testimony was said to be essential, inasmuch as he had brought a condensed cassette tape to the Miami Beach Police Department. This tape had been made by John Sion. The court stated that the condensed tape was not material except insofar as it might shed some light on when the original tape was made. Defense counsel argued that this was the reason, in fact, that he was seeking Froschneider's testimony. Defendants here argue that this fact is especially important in light of their affirmative defense of alibi for the night in question.

The recording originally made by John Sion has an extremely interesting origin. During May, 1977, Sion, who lived with his mother in an apartment near Picciolo's Restaurant, was awakened one morning (on an undetermined date) at 2:50 a.m., at which time he switched on his ham radio receiver and began reading a book. Upon hearing a conversation over the radio about "registers," he thought that the conversation might concern a robbery and, therefore, he began taping the conversation. Sion was unable to give the exact date of the making of the tape, although he testified that he had discussed the matter with Froschneider on May 26,

1977.[2] During their first conversation about the tape recording. Sion gave Froschneider the frequency numbers on which the conversation had been overheard and Froschneider wrote the numbers on a piece of paper. Froschneider contacted Sion about hearing the tape and Sion played the tape for him, but Froschneider had trouble understanding it.[3] Therefore, Sion made a condensed version of the original tape, omitting the numerous pauses.

Miami Beach Police Office Charles Hayes testified that he had observed defendant Granger at about 3:00 a.m. on the morning of May 23, 1977, driving a marked Miami Beach Police vehicle. He testifed that he observed Granger, who was in uniform, four or five times that morning within a two block radius of Picciolo's Restaurant. During the direct examination of Hayes, the jury was excused for the purpose of inquiring into the admissibility into evidence of Sion's original tape. The tape was played in its entirety. Hayes stated that he had previously heard the condensed version of the tape. Defense counsel objected to the admission of the original tape, arguing that there was no evidence linking it to the allegations contained in the information and that no testimony existed that the tape was made on May 23, 1977. The objection was overruled by the court and the

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[2]In an earlier sworn statement. Sion had testified that he told Chief Investigator Martin Dardis of the state attorney's office that he had taped the conversation during the Memorial Day weekend.

[3]Prior to trial, the defendants filed a motion seeking to suppress the tape recording because no intercept order had been obtained and because of defendants had a reasonable expectation of privacy in their walkie-talkie conversations. The motion was denied.

tape was admitted into evidence. Upon the jury's return to the courtroom, the original tape was again played in its entirety for the jury. Hayes identified the voices on the tape as those of the two defendants. The tape contained numerous statements purporting to link the defendants to the burglary. On cross-examination, Hayes admitted remembering something about a complaint once made by Chandler and an Officer Wilson against him (Hayes) to the police supervisor. Upon objection by the prosecutor, the court limited any further inquiry into Chandler's complaint against Hayes.

On June 17, 1977, state attorney office investigator William Riley secured the original tape from Sion. Both Sion and Riley initialed the tape and dated it. On July 12, 1977, Riley obtained the inner-mechanisms of several locks from Picciolo's Restaurant, including the lock from the door which had been discovered open. The locks were submitted to the Public Safety Department Crime Lab for analysis and it was determined that there were scratches in the lock that had come from the exterior side of the opened door and which were relatively fresh. A locksmith, Earl Hall, concluded that as the marks had been made on the pins of the lock, the lock had been "picked."

Police testimony revealed that Granger and Chandler did not work the shift from 11:00 p.m. on May 22, 1977, to 9:00 a.m. the following morning. Further testimony revealed that in May and June of 1977, because of the large number of police vehicles owned by the Department, some of the unused vehicles were kept on the street behind the station.

The chief maintenance engineer at LaGorce Country Club testified that in January of 1977, defendant Chandler had approached him with regard to radio equipment and that Chandler had shown him two walkie-talkies on June 3, 1977.

Upon the prosecution's resting its case, defense counsel moved for a judgment of acquittal on the basis of insufficient evidence and the lack of a prima facie case. Defense counsel further argued that the case of the prosecution consisted solely of inferences piled upon inferences. The court denied the motion and the defense proceeded with its testimony and evidence.

Donald Froschneider testified about his conversation with Sion concerning the tape recording and, although not recalling the exact date of the conversation, placed it at about Memorial Day (May 29) of 1977. He testified that he had listened to the condensed version of the tape at a subsequent time and that Sion had written down the frequency numbers on a piece of paper. He stated that he had brought the numbers to Lieutenant Webb of the Miami Beach Police Department, as well as the condensed version of the tape. Lieutenant Webb testified that he received the tape from Froschneider at the end of May, 1977, and that he immediately turned over the tape to Sergeant Morgan. Sergeant Morgan testified to receiving the tape from Lieutenant Webb on June 3, 1977, and that a piece of paper with numbers accompanied the tape, but he could not explain what happened to the piece of paper.

Sergeant Monteagudo of the Miami Beach Police Department testified that he received the condensed tape from Morgan on June 7, 1977, that he initialed it,

which was standard police procedure, that he wrote the words "B and E, Granger and Chandler" on the tape but that later he obliterated the writing and subsequently turned the tape over to Martin Dardis of the state attorney's office.

Defendants moved that the condensed tape be admitted into evidence but the prosecutor's objection to that motion was sustained, and the defendants, therefore, renewed the motion, which was denied, at the conclusion of all the testimony.

Defendants sought to call Miami Beach Police Officer Robert Wilson, but the prosecution objected to any testimony by Wilson concerning a complaint by Wilson and Chandler against Hayes. Defendants submitted that the testimony involved two issues: (1) Hayes's bias and prejudice and (2) the impeachment of Hayes's prior statements in court. The court ruled that the testimony was inadmissible as it was independent evidence of bias and prejudice.

Defense counsel then proffered that Warren Holmes would testify that he was told by Sion that the original tape recording was made during the Memorial Day weekend. This testimony was excluded by the court over the defendants' objection.

Sion's mother, Helen Sion, testified that she had been present at the time that the recording was made and that this took place at the end of May, 1977, subsequent to an eye operation she had undergone. Records of the date of her operation were placed into evidence.

The wives of both defendants testified that they were with their respective husbands during the entire period of the evening of May 22nd to the morning of May 23, 1977, and that neither defendant left home after retiring to bed between 11 o'clock and midnight on the 22nd.

At the conclusion of all the testimony, the defense renewed its motion for judgment of acquittal, which was denied, and the case was submitted to the jury. During consideration, the jury requested (through a written note) that the condensed tape be sent into the jury room. The court denied this request because the condensed version of the tape had not been introduced into evidence. The defense had previously attempted to introduce, out of the presence of the jury, the testimony of an expert witness who would describe orally and corroborate by photographs the purposeful effort to obliterate certain writings on the face of the condensed tape. However, this evidence was excluded as not being relevant or material to the issues.

The jury returned a verdict of guilty against both defendants and the court entered judgments thereon. Defense counsel then requested a presentence investigation, but inasmuch as Count I was a misdemeanor, no presentence investigation would be allowed on that count. Defense counsel argued that sentencing on the misdemeanor should be deferred pending completion of the presentence investigation and that if the court sentenced the defendants on the misdemeanor alone, then the court would be required to deny bail pursuant to Fla.R.Crim.P. 3.691(a). The court agreed with defense counsel's interpretation of this rule. Defense counsel then inquired whether the court would

consider bail pending appeal if the defendants waived a pre-sentence investigation. The court agreed, and the defendants waived their right to a presentence investigation. Thereupon, the court sentenced the defendants on all charges[4] and ordered that they be taken into custody on the ground that no notice of appeal had been filed and they were, therefore, not entitled to bail pending appeal. The following day, notice of appeal having been filed, the court set appeal bonds on both defendants. Post-trial motions were denied on the grounds that the court lacked jurisdiction. Subsequently, on December 29, 1977, this court temporarily relinquished jurisdiction to afford the trial court an opportunity to rule on the defendants' post-trial motions. Pursuant to this court's order, on January 4, 1978, the trial court conducted a hearing on, and denied, the motions.

The first point of the defendants urges error upon the trial court's refusal to preclude television cameras

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[4]Each defendant was sentenced as follows:

Count I — one year imprisonment in the county jail.

Count II — five years imprisonment in the state penitentiary (to run from the date of the expiration of the sentence in Count I).

Count III — one year imprisonment in the state penitentiary and four years probation (to run from the expiration of the sentence imposed in Count II).

Count IV — five years probation (to run from the expiration of the sentence — and probation — imposed in Count III).

from their trial.[5] Experimental Canon 3 A(7), Code of Judicial Conduct of the State of Florida, was promulgated by the Florida Supreme Court pursuant to its inherent and constitutional power under Article V of the Florida Constitution. The canon establishes standards and criteria for the use of cameras and electronic recording devices in all of Florida's courtrooms. The court, therefore, must be presumed to have considered that the adoption of the canon preserves the rights of the parties.

In determining that a one year trial program should be instituted, the Florida Supreme Court has determined that camera coverage of a trial does not, in and of itself, violate the federal and state constitutions. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.2d 1 (Fla. 1976), 337 So.2d 804 (Fla. 1976), 347 So.2d 402 (Fla. 1977), 347 So.2d 404 (Fla. 1977). We, therefore, decline to discuss further the constitutionality per se of the canon, although we will, in view of the importance of the question involved, certify the decision to the Supreme Court of Florida as a question of great public interest.

[1] We pass on to that portion of the defendants' point which urges that matters occurring in their trial pursuant to the experimental canon deprived them of their right to a fair trial and was violative of due process of law. The defendants urge error with regard to two

[5]"Whether the trial court erred in denying defendants' various motions to declare Experimental Canon 3A(7) unconstitutional in refusing to preclude television cameras from defendants' trial and in declining to sequester the trial jury, all contrary to defendants' Sixth and Fourteenth Amendment rights to a fair and impartial trial and due process of law."

rulings allowing television cameras in the courtroom during their trial; error is urged (1) in declining to preclude television cameras from their trial and (2) in declining to sequester the jury. However, the defendants have not met their burden of showing from this record that either of these circumstances operated to deprive them of a fair trial.

We have examined the record in the light of the defendants' contentions under this point and find no reason on this record to hold that the admission of television cameras into this particular trial caused the defendants any difficulty in the preparation or presentation of their case or deprived them of a impartial jury. Accordingly, we hold that no error is shown by the defendants' first point.

[2] The defendants' second point urges that the trial court erred in denying their motion to suppress the tape recorded conversation.[6]

Section 934.02(1), Florida Statutes (1977), defines "wire communication" as

> ". . . any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating

[6]"Whether the trial court erred in denying defendants' motion to suppress the tape recorded oral conversation where that conversation was intercepted and recorded in violation of Chapter 934, Florida Statutes (197[7])."

such facilities for the transmission of intrastate, interstate or foreign communications;"

It is clear that the tape recording in this case was not an interception of a communication transmitted by wire or cable furnished or operated by a common carrier. The defendants engaged in an "open air" conversation while using commercially-sold walkie-talkies or handie-talkies. John Sion heard the conversation by accident when he turned on his short-wave radio receiver. Sion was a private individual who lived in an apartment on the tenth floor of a highrise building near Picciolo's Restaurant, where the conversation of the defendants took place. He had purchased his short-wave-band radio receiver from a commercial retailer of electronic equipment.

At trial, defendant Chandler testified that he and defendant Granger staged a bogus burglary on the air as a part of a wager to see whether anyone was listening. The trial court correctly concluded from the testimony that the defendants did not exhibit a justifiable expectation that their conversation would remain private.

Even without this justification, we would hold that the intercepted conversation is not prohibited by Chapter 934, Florida Statutes (1977).

The third point presented urges that it was prejudicial error for the trial court to deny the defendants' offer into evidence of the condensed version of the taped conversation. It is argued that the condensed version was relevant because: (1) all voice identifications were made from it, and (2) the admission

of the condensed version would have corroborated defendants' alibi defense.

[3-5] Trial courts enjoy a certain discretion in the ruling on the admissibility of evidence. Simply because a defendant thinks that tendered evidence might be beneficial does not make its rejection reversible error. Cf. the principle of law in *Rodriguez v. State,* 327 So.2d 903 (Fla.3d DCA 1976). Nevertheless, where evidence tends in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission. See *Watts v. State,* 354 So.2d 145 (Fla.2d DCA 1978). The true test then is whether the tendered condensed version of the taped conversation was relevant to the defense presented. The defendants have failed to present to the trial court or to this court any reasonable theory upon which the admission of the condensed version of the tape would have helped prove their defense. The defendants did not deny having the conversations over the air. The disputed issue was whether the conversations were connected with the robbery with which they were charged. The contents of the condensed version had no relevancy to that issue.

It is suggested that markings or an erasure on the body of the frame holding the tape might have helped prove that the first tape was not made on the night in question. Insofar as this speculative possibiity is concerned, we find no error in the trial court's ruling. The alleged error complained of is not a limitation upon examination or cross-examination, but rather the failure to admit physical evidence.

[6] The defendants' fourth point contends that they were entitled to a judgment of acquittal pursuant

to their motion for a new trial because of the insufficiency of the evidence against them. We hold the evidence to be sufficient. It placed the defendants at the scene of the crime and the taped conversation tied them firmly to the crime as its perpetrators. The fourth point does not present error. See *Lynch v. State,* 293 So.2d 44, 45 (Fla. 1974).

[7, 8] The defendants' fifth point deserves a more detailed consideration.[7] The defendants claim that they were deprived of the right of cross-examination and the introduction of evidence to show that one of the State's witnesses, Officer Hayes, was hostile to them. Defense counsel was allowed to develop his theory that Hayes was prejudiced against Chandler and Granger because they had once made a complaint concerning Hayes to

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[7]Appellants' fifth point attempts to show a multiplicity of errors. It is as follows:

> "Whether the trial court erred in restricting defense counsel's cross-examination of prosecution witnesses and in his direct examination of defense witnesses and exclusion of certain defense exhibits thereby precluding any meaningful confrontation of the evidence presented by the prosecution as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16, of the Constitution of the State of Florida."

We confine ourselves to the point as argued in the brief.

their shift officer.[8] Also, during the presentation of the defendants' case, Officer Wilson was precluded from going further into the matter. We hold that the defendants were allowed sufficient latitude both in their cross-examination and direct examination to present the matter for full consideration by the jury. It may well be that defendants would have liked to give the matter greater prominence but the trial court's ruling was well within the range of the discretion granted to it by the holding of the Supreme Court of Florida in *Eldridge v. State,* 27 Fla. 162, 9 So. 448 (1891).[9] See also *Welch v. State,* 342 So.2d 1070 (Fla. 3d DCA 1977); *Dabney v. Yapa,* 187 So.2d 381 (Fla. 3d DCA 1966); and *H.I. Holding Company v. Dade County,* 129 So.2d 693 (Fla.

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[8]On cross-examination, Officer Hayes acknowledged that the defendant Chandler and Officer Wilson once complained that Hayes was taking coffee breaks and that Chandler, Wilson and Hayes discussed the matter in a police car. Officer Hayes testified that he did not remember even the gist of the conversation. Officer Wilson was called as a witness by the defendant and after a lengthy discussion outside the jury's presence, the trial court did not permit defense counsel to inquire into the details of this informal complaint.

[9] * * * * * *

"It is competent to show as a fact that a witness is hostile to the party against whom he testifies, and the jury can consider this hostility in estimating his testimony; but an inquiry into the conduct and acts of parties producing the hostility raises another and collateral issue, which should not be permitted to be gone into by the trial judge, otherwise there would be no limit to the investigation of any cause." 9 So. at 452.

* * * * * *

3d DCA 1961). And cf. *Irvin v. State,* 66 So.2d 288, 294 295 (Fla. 1953).

[9] The sixth point claims error because there was no presentence investigation. See Florida Rule of Criminal Procedure 3.710. We hold that this rule is not applicable where the defendant specifically waives the investigation. See *Rinaldi v. State,* 343 So.2d 94 (Fla. 3d DCA 1977); and *Johns v. State,* 330 So.2d 526 (Fla. 1st DCA 1976). The defendants' suggestion that the waiver was "forced" is without foundation on this record.

Having considered each point presented and finding no reversible error, the judgments and sentences are affirmed.

Affirmed.

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Case Nos. 56,040, 56,194
and 56,236

(District Court of Appeal of the State of Florida, Third District, Case No. 77-2624)

NOEL CHANDLER and
ROBERT GRANGER,

Appellants,

-vs-

STATE OF FLORIDA,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that NOEL CHANDLER and ROBERT GRANGER, the Appellants above-named, hereby appeal to the Supreme Court of the United States from the Final Order of the Supreme Court of Florida, affirming the Judgment of Conviction entered herein on September 27, 1979, and made final by denial of a Petition for Rehearing herein on December 10, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

DATED at Miami, Florida this 2nd day of January, 1980.

Respectfully submitted,

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By:
JOEL HIRSCHHORN
[Certificate of Service Omitted]

Filed: January 3, 1980

In re PETITION OF POST-NEWSWEEK STATIONS, FLORIDA, INC. for Change in Code of Judicial Conduct.

No. 46835.

Supreme Court of Florida.

April 7, 1977.

Case of Original Jurisdiction — Code of Judicial Conduct.

Talbot D'Alemberte of Steel, Hector & Davis, Miami, for petitioner.

Joseph C. Jacobs of Ervin, Varn, Jacobs & Odom, Tallahassee, for Fla. Ass'n of Broadcasters, Inc.

Parker Lee McDonald, Orlando, Chairman, for the Fla. Conference of Circuit Judges.

Richard C. McFarlain, Tallahassee, Asst. Director, for The Fla. Bar.

Robert Eagan, State's Atty. and Donald A. Lykkebak, Asst. State's Atty., for State of Fla.

Ellis S. Rubin of Ellis Rubin Law Offices, Miami, for Rommie L. Loudd.

A. Broaddus Livingston, Chairman, Tampa, and Larry S. Stewart, Chairman-Elect, Miami, for Trial Lawyers Section of The Florida Bar.

Gary C. Williams of Ausley, McMullen, McGehee, Carothers & Proctor, Tallahassee, for Soc. of Professional Journalists, Sigma Delta Chi, Southeast Region and Greater Miami Chapter, intervenor.

Richard E. Gerstein, State's Atty., and N. Joseph Durant, Jr., Chief Asst. State's Atty., for Fla. Prosecuting Attys. Ass'n, amicus curiae.

Harold Peter Barkas, Miami, for Academy of Fla. Trial Lawyers, amicus curiae.

SUPPLEMENTAL INTERLOCUTORY DECISION

SUNDBERG, Justice.

By interlocutory opinion filed in this cause on January 28, 1976, reported at 327 So.2d 1 (Fla.1976), which decision has been several times supplemented to provide, *inter alia,* for inclusion of still camera photography, this Court has sought to have conducted for experimental purposes one televised civil and one televised criminal trial. The purpose of the experimental trials was to provide the Court additional data upon which to base its decision concerning the proposed modification of Canon 3 A(7) of the Code of Judicial Conduct of the State of Florida.

Among the guidelines imposed by the interlocutory decision was the requirement that all participants in such experimental trials consent to the experiment. The Court has met with total failure in securing the conduct of a trial in which all participants will consent, within the deadline of April 1, 1977, for conducting the experimental trials. However, it remains the view of this

Court that a test period during which trials will be conducted at which the electronic media and still photographers will be present is essential to a reasoned decision on the petition for modification of Canon 3 A(7).

Consequently, in order to gain the experience which we deem essential to a proper final determination of this cause, it is the decision of this Court to invoke a pilot program with a duration of one year from July 1, 1977, during which the electronic media, including still photography, may televise and photograph, at their discretion, judicial proceedings, civil, criminal, and appellate, in all courts of the State of Florida, subject only to the prior adoption of standards with respect to types of equipment, lighting and noise levels, camera placement, and audio pickup, and to the reasonable orders and direction of the presiding judge in any such proceedings. To this end, counsel for the respective parties are directed to develop and submit to this Court on or before May 15, 1977, proposed standards concerning technology and conduct for consideration and adoption by the Court prior to July 1, 1977. In the event accord cannot be reached by the parties as to such recommended standards, the respective recommendations of the parties shall be submitted to the Court not later than May 15, 1977, for consideration and resolution. At the request of counsel for any party to these proceedings, a conference may be convened with Justice Sundberg, as conferee of the Court, to clarify and expedite the procedures for development of the proposed standards.

It is so ordered.

OVERTON, C.J., and ADKINS, BOYD, ENGLAND, SUNDBERG, HATCHETT and KARL, JJ., concur.

Supreme Court of the United States

No. A-580

NOEL CHANDLER AND ROBERT GRANGER,
Petitioners,

v.

FLORIDA

ORDER

UPON CONSIDERATION of the application for continuation of stay and the Attorney General of Florida interposing no opposition thereto,

IT IS ORDERED that the stay of proceedings entered by the Supreme Court of Florida on December 10, 1979, case nos. 56,040, 56,194 and 56,236, is hereby continued pending the filing and disposition of a petition for a writ of certiorari in the above-entitled cause. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

A true copy
MICHAEL RODAK, JR.
Test:
Clerk of The Supreme Court of
the United States
Francis Jordan
Deputy

Dated this 11 day of January, 1980